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RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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and WILLIAM CARTER

E-filing

WHA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

HOWARD ZIMMERMAN
and WILLIAM CARTER

Plaintiffs,

v.

CITY of SOUTH SAN FRANCISCO,
SOUTH SAN FRANCISCO POLICE
DEPARTMENT, MARK
RAFFAELLI, and DOES 1 through
10,

Defendants.

No. 07 3623

COMPLAINT FOR EMPLOYMENT
DISCRIMINATION BASED ON MILITARY
SERVICE IN VIOLATION OF USERRA AND
THE CALIFORNIA MILITARY AND
VETERANS CODE

TRIAL BY JURY DEMANDED

Plaintiffs Howard Zimmerman and William Carter (hereinafter referred to
collectively as "Plaintiffs") complain and allege as follows:

PARTIES

1. Plaintiff Howard Zimmerman (hereinafter referred to as "Plaintiff
Zimmerman") is a police officer employee of Defendants City of South San Francisco and
South San Francisco Police Department (hereinafter collectively referred to as
"Defendants SSF"). Plaintiff Zimmerman commenced employment as a police officer
with Defendants SSF in 1997.

2. Plaintiff William Carter (hereinafter referred to as "Plaintiff Carter") is a police officer employee of Defendants SSF. Plaintiff Carter commenced employment as a police officer with Defendants SSF in 1978.

3. At all material times, Plaintiffs were employees of Defendants SSF in South San Francisco, California and the employment relationship upon which they sue herein was entered into in the State of California and to be performed in the State of California.

4. Defendant City of South San Francisco is a municipal corporation under the laws of the State of California. Defendant South San Francisco Police Department is the Police Department for the City of South San Francisco.

5. At all material times, Defendant Mark Raffaelli was and still is the Chief of Police for the City of South San Francisco Police Department.

6. The names and capacities of the Defendants named herein as Does 1 through 10 inclusive, whether individual, corporate, associate, or otherwise, are unknown to Plaintiff, who therefore sues such Defendants by fictitious names pursuant to California Code of Civil Procedure Section 474. Plaintiff is informed and believes that the Doe Defendants are in some way responsible for the damages claimed herein and will amend this Complaint to allege such true names and capacities when they have been determined.

7. Plaintiff is informed and believes and on that basis alleges that each Defendant was an agent, managing agent, officer, shareholder, employee, partner, joint venturer, aider or abettor, alter ego, or co-conspirator of the remaining Defendants and acting within the course and scope of that relationship. Plaintiff is further informed and believes and on that basis alleges that each of the Defendants herein gave consent to, authorized, and/or ratified the conduct of the other Defendants.

JURISDICTION AND VENUE

8. Plaintiffs bring this lawsuit against Defendants seeking all available relief under the Uniformed Services Employment and Reemployment Rights Act of 1994

1 (hereinafter referred to as "USERRA"), 38 U.S.C. §§ 4301, *et. seq.* and the California
2 Military and Veterans Code §§ 394 *et. seq.*

3 9. This Court has jurisdiction over this lawsuit pursuant to 28 U.S.C. §1331
4 and 38 U.S.C. §4323(b)(1).

5 10. Venue in this Court is proper pursuant to 28 U.S.C. §1391 and 38 U.S.C.
6 §4323(c)(2).

7 **PERTINENT FACTS RE PLAINTIFF ZIMMERMAN**

8 11. Plaintiff Zimmerman commenced employment with Defendants SSF in
9 1997 as a Police Officer. In December 2003, Plaintiff Zimmerman was promoted to
10 Police Corporal and has maintained that job title ever since.

11 12. Throughout his employment, Plaintiff Zimmerman has performed his
12 duties in a diligent and competent manner, consistently receiving positive feedback and
13 commendations from his superiors and co-workers regarding his job performance.

14 13. During all relevant times, Plaintiff Zimmerman was a member of the
15 California Army National Guard and, as such, was a member of the "uniformed services"
16 under USERRA (*See* 38 U.S.C. §4303(13)) and a member of the military forces of the
17 United States under California Military and Veterans Code §§ 394 *et. seq.*

18 14. During his employment with Defendants SSF, Plaintiff Zimmerman was
19 called to full time active duty on multiple occasions, including but not limited to two
20 deployments to Iraq from June 2004 to November 2004 and from October 2005 to
21 September 2006, and one deployment to Ft. Lewis Washington from October 2001 to July
22 2002. Plaintiff Zimmerman received multiple awards and medals for his military service,
23 including but not limited to a Bronze Star Medal for Valor with two Oak Leaves and a
24 Purple Heart for wounds received in combat.

25 15. While serving as a Police Officer for Defendants SSF, Plaintiff
26 Zimmerman was desirous of being promoted to Corporal and applied for Corporal
27 positions for nearly two years before he was eventually promoted to Corporal in early
28 2004. Plaintiff Zimmerman's military status and service was a motivating factor for

1 Defendants SSF and Defendant Raffaelli's refusal to consider him for promotion to
2 Corporal before early 2004 and, in the absence of such motivation, Plaintiff Zimmerman
3 would have been promoted.

4 16. In October 2005, Plaintiff Zimmerman was redeployed to Iraq for a
5 second tour of full time active duty with the Army. While serving in Iraq in January
6 2006, Plaintiff Zimmerman learned of Defendants SSF intent to conduct examinations for
7 the position of Police Sergeant. Desiring promotion, Plaintiff Zimmerman emailed
8 Defendant Raffaelli that he was interested in becoming a Sergeant, would like to compete
9 for the position, and requested that the examination, which was scheduled for February
10 2006, be postponed until his return from military service or that an alternative means for
11 him to take the test be arranged. Defendant Raffaelli and Defendants SSF denied Plaintiff
12 Zimmerman's request. On or about February 7, 2006, Plaintiff Zimmerman provided
13 Defendants his resume, notified them he wished to be considered for the Sergeant
14 position, and again requested the Sergeant promotional exam be postponed until his return
15 from military service or that an alternative means for him to take the test be arranged.
16 Defendants SSF and Defendant Raffaelli again refused Plaintiff Zimmerman's request and
17 proceeded with the promotional exam while Plaintiff Zimmerman was on active duty in
18 Iraq. Defendants SSF and Defendant Raffaelli subsequently awarded the Sergeant
19 position to one individual who took the exam and was lesser qualified than Plaintiff
20 Zimmerman and who was non-military personnel. Plaintiff Zimmerman's military status
21 and service was a motivating factor for Defendants SSF and Defendant Raffaelli's refusal
22 to allow him to take the Sergeant's promotional exam and/or to consider him for
23 promotion to Sergeant and, in the absence of such motivation, Plaintiff Zimmerman would
24 have been promoted to Sergeant.

25 17. When Plaintiff Zimmerman returned from Iraq to work for Defendants
26 SSF and Defendant Raffaelli in December 2006, said Defendants refused to allow
27 Plaintiff Zimmerman to return to the same position of Special Agent with the San Mateo
28 County Task Force (hereinafter referred to as "VTTF) to which he had been assigned at

1 the time of his redeployment to Iraq in October 2005. Plaintiff Zimmerman's military
2 status and service was a motivating factor for Defendants SSF and Defendant Raffaelli's
3 refusal to allow him to return to the VTTF position and, in the absence of such motivation,
4 Plaintiff Zimmerman would have been assigned to the VTTF position he previously held.

5 18. During Plaintiff Zimmerman's employment with Defendants SSF,
6 Defendant Raffaelli's conduct and actions created a hostile environment for police
7 officers who had served and were serving in military service, including Plaintiff
8 Zimmerman. Some examples of Defendant Raffaelli's biased conduct include but are not
9 limited to pressuring Plaintiff Zimmerman to terminate his military service, prohibiting
10 military reservists from serving on the same team, complaints about and instruction to
11 cease recruitment of South San Francisco police officers into military service, comments
12 regarding it was hard to evaluate Plaintiff Zimmerman because absences due to military
13 service, unjustifiably criticizing Plaintiff Zimmerman for his comments before the City
14 Council at a Council meeting in February 2007 honoring those who served in the military
15 and thanking the City Council for its support, asking Plaintiff Zimmerman every time he
16 applied for a special assignment or promotion when he was getting out of the military
17 service, at a City Council meeting referring to police officers who served in the National
18 Guard or Army Reserves as doing so "for purely selfish reasons", and denying
19 promotional opportunities to Plaintiff Zimmerman.

20 19. As a result of Defendants' illegal conduct, Plaintiff Zimmerman has
21 suffered various damages, including lost wages and benefits and emotional distress.

22 PERTINENT FACTS RE PLAINTIFF CARTER

23 20. Plaintiff Carter commenced employment with Defendants SSF in 1978 as
24 a Police Officer. In 1997, Plaintiff Carter was promoted to Police Sergeant and has
25 maintained that job title ever since.

26 21. Throughout his employment, Plaintiff Carter has performed his duties in
27 a diligent and competent manner, consistently receiving positive feedback and
28 commendations from his superiors and co-workers regarding his job performance.

1 22. From 1984 to 2001, Plaintiff Carter was a member of the California
2 Army National Guard and from 2001 to the present, Plaintiff Carter was a member of the
3 United States Army Reserve. As such, he was a member of the "uniformed services"
4 under USERRA (*See* 38 U.S.C. §4303(13)) and a member of the military forces of the
5 United States under California Military and Veterans Code §§ 394 *et. seq.*

6 23. During his employment with Defendants SSF, Plaintiff Carter was called
7 to full time active duty on multiple occasions, including but not limited to two
8 deployments to Iraq from September 2003 to March 2004 and from September 2005 to
9 September 2006, and other deployments to Dublin, California from January 2003 to
10 September 2003, Fort Hood, Texas from June 2005 to September 200, Saudi Arabia from
11 December 1990 to June 1991, and Germany from January 1997 to September 1997.
12 Plaintiff Carter received multiple awards and medals for his military service, including but
13 not limited to Bronze Star Medal, Kuwait Liberation Medals, and Global War on
14 Terrorism Service and Expeditionary medals.

15 24. While serving as a Police Sergeant for Defendants SSF, Plaintiff Carter
16 was desirous of being promoted to Lieutenant or Captain. In early 2003, Plaintiff Carter
17 applied for an open Lieutenant position. Defendant Raffaelli looked at him and asked,
18 "What are you doing here?" Thereafter, Plaintiff Carter was informed he did not pass the
19 promotion exam. Subsequently, the Training and Recruitment Officer told Plaintiff Carter
20 that something was "funny" about the exam results. Other individuals less qualified than
21 Plaintiff Carter for the Lieutenant position and who were non-military were selected by
22 Defendant Raffaelli and Defendants SSF. Plaintiff Carter's military status and service
23 was a motivating factor for Defendants SSF and Defendant Raffaelli's refusal to consider
24 him for promotion to Lieutenant and, in the absence of such motivation, Plaintiff Carter
25 would have been promoted.

26 25. In July 2004, when Plaintiff Carter applied for an open Captain's
27 position, an individual less qualified than Plaintiff Carter for the Captain position and who
28 was non-military was selected by Defendant Raffaelli and Defendants SSF. Plaintiff

1 Carter's military status and service was a motivating factor for Defendants SSF and
2 Defendant Raffaelli's refusal to promote him to Captain and, in the absence of such
3 motivation, Plaintiff Carter would have been promoted to Captain.

4 26. In June 2005, Plaintiff Carter was activated and deployed to Fort Hood,
5 Texas. In December 2005, he was redeployed to Iraq for a second tour of full time active
6 duty with the Army. While serving in Iraq in January 2006, Plaintiff Carter learned of
7 Defendants SSF intent to conduct examinations for the position of Police Lieutenant.
8 Desiring promotion, Plaintiff Carter, on January 10, 2006, emailed Defendant Raffaelli
9 that he was interested in becoming Lieutenant, wanted to apply for the position and test,
10 which was scheduled while he was in Iraq, and requested that the examination be
11 postponed until his return from military service or that an alternative means for him to
12 take the test be arranged. Plaintiff Carter followed up this email with a similar email
13 request to Defendants SSF's Human Resources Department with his resume and had
14 copies of his email and resume delivered to Defendants SSF. Defendant Raffaelli and
15 Defendants SSF denied Plaintiff Carter's request and proceeded with the promotional
16 exam on or about February 15, 2006 while Plaintiff Carter was on active duty in Iraq. In
17 October 2006 and January 2007, after Plaintiff Carter had returned from Iraq, Defendants
18 SSF and Defendant Raffaelli promoted two lesser qualified non-military individuals to the
19 Lieutenant position, both of whom used to be supervised by Plaintiff Carter. Plaintiff
20 Carter's military status and service was a motivating factor for Defendants SSF and
21 Defendant Raffaelli's refusal to allow him to take the Lieutenant's promotional exam
22 and/or to consider him for promotion to Lieutenant and, in the absence of such motivation,
23 Plaintiff Carter would have been promoted to Lieutenant.

24 27. During Plaintiff Carter's employment with Defendants SSF, Defendant
25 Raffaelli's conduct and actions created a hostile environment for police officers who had
26 served and were serving in military service, including Plaintiff Carter. Some examples of
27 Defendant Raffaelli's biased conduct include but are not limited to pressuring Plaintiff
28 Carter to terminate his military service, prohibiting military reservists from serving on the

1 same team, calling Plaintiff Carter's military unit while he was on active duty and
2 inquiring if Plaintiff Carter had volunteered for active duty and asking if he could fire
3 him, at a City Council meeting referring to police officers who served in the National
4 Guard or Army Reserves as doing so "for purely selfish reasons", unjustifiably criticizing
5 Plaintiff Zimmerman, who Plaintiff Carter accompanied, for his comments before the City
6 Council at a Council meeting in February 2007 honoring those who served in the military
7 and thanking the City Council for its support, not allowing Plaintiff Carter to return to his
8 second year in Investigations upon his return from Iraq in 2004, and denying promotional
9 opportunities to Plaintiff Carter.

10 28. As a result of Defendants' illegal conduct, Plaintiff Carter has suffered
11 various damages, including lost wages and benefits and emotional distress.

12 **FIRST CAUSE OF ACTION**
13 **(USERRA/Zimmerman)**

14 29. All previous paragraphs are incorporated as though fully set forth herein.
15 This cause of action is pled against all Defendants.

16 30. Under USERRA, an employer or person may not discriminate in
17 employment against or take any adverse employment action against any person on the
18 basis of that person's service in the uniformed services. 38 U.S.C. §4311. Under
19 USERRA, among other things, an employer must reemploy a returning military service
20 employee "in the position of employment in which the person would have been employed
21 if the continuous employment of such person with the employer had not been interrupted
22 by such service, or a position of like seniority, status and pay, the duties of which the
23 person is qualified to perform;" 38 U.S.C. §4313(a)(2)(A).

24 31. Defendants violated Plaintiff Zimmerman's rights under USERRA when
25 they denied him the aforementioned Corporal and Sergeant promotional opportunities,
26 reemployment to VTTF upon his return from active duty in December 2006, and created a
27 workplace environment hostile to those individuals, including Plaintiff Zimmerman, who
28 served in the military.

1 32. As a result of Defendants' illegal conduct, Plaintiff Zimmerman has
2 suffered significant damages, including lost wages and benefits and emotional pain and
3 suffering.

4 33. Defendants conduct was willful, entitling Plaintiff Zimmerman to
5 liquidated damages allowed by 38 U.S.C. §4323(d)(1)(C).

6 34. Plaintiff Zimmerman is entitled to his attorneys fees and litigation costs
7 pursuant to 38 U.S.C. §4323(h)(2).

8 **SECOND CAUSE OF ACTION**
9 **(California Military and Veterans Code/Zimmerman)**

10 35. All previous paragraphs are incorporated as though fully set forth herein.
11 This cause of action is pled against all Defendants.

12 36. Pursuant to California Military and Veterans Code §§394 *et. seq.*, no
13 person or employer shall discriminate in employment against or take any adverse
14 employment action against any person on the basis of that person's service in or
15 membership of the uninformed services.

16 37. Defendants violated Plaintiff Zimmerman's rights under California
17 Military and Veterans Code §§394 *et. seq.* when they denied him the aforementioned
18 Corporal and Sergeant promotional opportunities, reemployment to VTTF upon his return
19 from active duty in December 2006, and created a workplace environment hostile to those
20 individuals, including Plaintiff Zimmerman, who served in the military.

21 38. As a result of Defendants' illegal conduct, Plaintiff Zimmerman has
22 suffered significant damages, including lost wages and benefits and emotional pain and
23 suffering.

24 39. Plaintiff Zimmerman is entitled to his attorneys fees and litigation costs
25 pursuant to California Military and Veterans Code §394(g).

**THIRD CAUSE OF ACTION
(USERRA/Carter)**

40. All previous paragraphs are incorporated as though fully set forth herein. This cause of action is pled against all Defendants.

41. Under USERRA, an employer or person may not discriminate in employment against or take any adverse employment action against any person on the basis of that person's service in the uniformed services. 38 U.S.C. §4311. Under USERRA, among other things, an employer must reemploy a returning military service employee "in the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service, or a position of like seniority, status and pay, the duties of which the person is qualified to perform;" 38 U.S.C. §4313(a)(2)(A).

42. Defendants violated Plaintiff Carter's rights under USERRA when they denied him the aforementioned Lieutenant and Captain promotional opportunities and created a workplace environment hostile to those individuals, including Plaintiff Carter, who served in the military.

43. As a result of Defendants' illegal conduct, Plaintiff Carter has suffered significant damages, including lost wages and benefits and emotional pain and suffering.

44. Defendants conduct was willful, entitling Plaintiff Carter to liquidated damages allowed by 38 U.S.C. §4323(d)(1)(C).

45. Plaintiff Carter is entitled to his attorneys fees and litigation costs pursuant to 38 U.S.C. §4323(h)(2).

**FOURTH CAUSE OF ACTION
(California Military and Veterans Code/Carter)**

35. All previous paragraphs are incorporated as though fully set forth herein. This cause of action is pled against all Defendants.

36. Pursuant to California Military and Veterans Code §§394 *et. seq.*, no person or employer shall discriminate in employment against or take any adverse

1 employment action against any person on the basis of that person's service in or
2 membership of the uninformed services.

3 37. Defendants violated Plaintiff Carter's rights under California Military and
4 Veterans Code §§394 *et. seq.* when they denied him the aforementioned Lieutenant and
5 Captain promotional opportunities and created a workplace environment hostile to those
6 individuals, including Plaintiff Carter, who served in the military.

7 38. As a result of Defendants' illegal conduct, Plaintiff Carter has suffered
8 significant damages, including lost wages and benefits and emotional pain and suffering.

9 39. Plaintiff Carter is entitled to his attorneys fees and litigation costs
10 pursuant to California Military and Veterans Code §394(g).

11 WHEREFORE, Plaintiff Zimmerman prays for judgment against Defendants
12 as follows:

13 1. An injunction prohibiting Defendants from engaging in future violations
14 of the USERRA and the California Military and Veterans Code;

15 2. Immediate promotion, with full seniority and other benefits, to the
16 position of Police Sergeant;

17 3. For compensatory and general damages, including back pay and
18 emotional distress, to the fullest extent permitted under USERRA and California Military
19 and Veterans Code;

20 4. Liquidated damages and monetary penalties to the fullest extent permitted
21 under USERRA (*e.g.* 38 U.S.C. §4323(d)-(e)) and California Military and Veterans Code
22 §394;

23 5. Litigation costs, expenses, attorneys' fees to the fullest extent permitted
24 under USERRA (*e.g.* 38 U.S.C. §4323(h)) and California Military and Veterans Code
25 §394(g);

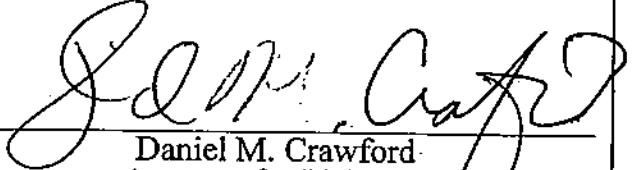
26 6. For costs of suit incurred herein;

27 7. For such other and further relief as the Court may deem proper.
28

1 WHEREFORE, Plaintiff Carter prays for judgment against Defendants as
2 follows:

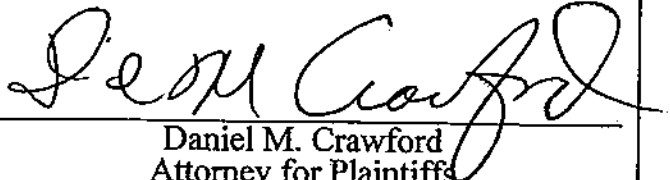
- 3 1. An injunction prohibiting Defendants from engaging in future violations
4 of the USERRA and the California Military and Veterans Code;
- 5 2. Immediate promotion, with full seniority and other benefits, to the
6 position of Police Lieutenant or Police Captain;
- 7 3. For compensatory and general damages, including back pay and
8 emotional distress, to the fullest extent permitted under USERRA and California Military
9 and Veterans Code;
- 10 4. Liquidated damages and monetary penalties to the fullest extent permitted
11 under USERRA (e.g. 38 U.S.C. §4323(d)-(e)) and California Military and Veterans Code
12 §394;
- 13 5. Litigation costs, expenses, attorneys' fees to the fullest extent permitted
14 under USERRA (e.g. 38 U.S.C. §4323(h)) and California Military and Veterans Code
15 §394(g);
- 16 6. For costs of suit incurred herein;
- 17 7. For such other and further relief as the Court may deem proper.

18 DATED: July 13, 2007.

19
20 
21 Daniel M. Crawford
22 Attorney for Plaintiffs
Howard Zimmerman and William Carter

23 **TRIAL BY JURY DEMANDED**

24 Plaintiffs hereby demand trial by Jury:

25
26 
27 Daniel M. Crawford
28 Attorney for Plaintiffs
Howard Zimmerman and William Carter